(2)

NO. 91-458

In the Supreme Court of the United States

OCTOBER TERM, 1991

RIVERSIDE MARKET LIMITED PARTNERSHIP, ET AL.
(Philip C. Witter; Gordon H. Kolb, Hirschel T. Abbott, Jr.; Philip Gensler, Jr.; George G. Villere; G. Walter Loewembaum; Lillian Shaw Loewembaum; Leon T. Reymond, Jr.; George V. Young; Michael R. Schneider)
Petitioner

VS.

T. GENE PRESCOTT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HELD THAT SHAREHOLDERS, OFFICERS AND DIRECTORS OF A CORPORATION ARE TOTALLY EXEMPT FROM LIABILITY UNDER CERCLA, THEREBY CONTRADICTING HOLDINGS OF THE EIGHTH AND SECOND CIRCUIT COURTS OF APPEALS.

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STATEMENT OF THE CASE

The Petitioners herein seek to hold a shareholder liable for the costs of cleanup of hazardous waste under CERCLA despite the undisputed fact that the shareholder was not in any way involved in either the day-to-day operations of the facility or the disposal of such waste. Such a holding would be contrary to every judicial decision published on the subject as well as a clear reading of the pertinent statute. This Court should, therefore, not choose to review the Fifth Circuit's refusal to defy precedent and statutory authority by granting Petitioner's request.

The following facts are undisputed:

For some 57 years an asbestos manufacturing plant was operated in the City of New Orleans on Tchoupitoulas Street at the foot of Jefferson Avenue (the "Plant"). It was the demolition of the manufacturing facility located on the Plant site which gave rise to the captioned suit. The Plant had been operated for 25 years by R. J. Dorn Corporation and Asbestone Corporation, followed by 28 years operation by National Gypsum Company. Von Dohlen Affidavit, Record at p. 85, para. 4. [The affidavits of Gerard N. von Dohlen and T. Gene Prescott are attached to this opposition as Respondent's Appendices ("Resp. App.") A and B, respectively. They are found in the record Vol. I, at pp. 84-95.] On March 11, 1981, the Plant site, the Plant facility, and all of the equipment and materials therein were purchased by a duly organized Delaware corporation, a defendant in the district court, International Building Products, Inc. ("IBP"). The Plant was operated by IBP until March of 1985, at which time production ceased because of a declining market for asbestos containing materials in the United States. During the entire period in which the Plant was operated, it was used to manufacture asbestos cement

products such as shingles, siding, and flat sheets. Resp. App. A at paras. 3 and 4; Record at p. 85.

No one associated with IBP had any experience in dealing with asbestos. Thus, the entire National Gypsum work force located at the Plant was hired by IBP to continue the operation of the Plant. The former National Gypsum plant manager, Ray Plauche, who had served in that capacity for a number of years, was among those retained by IBP. Resp. App. A, para. 5; Record at p. 85. Throughout the time that the Plant site was owned by IBP, Mr. Plauche held the title of Vice President of Manufacturing and was the person in charge of running the Plant on a day-to-day basis. Resp. App. A, paras. 8 and 11; Record at pp. 86 and 87.

The Plant was a large operation, employing between 220 and 240 people. Five levels of management separated the Chief Executive Officer of the company (Mr. von Dohlen and then Mr. Timothy Eames) from the employees who actually operated the equipment and handled the raw materials involved in the manufacturing process. Resp. App. A, paras. 6, 7 and 8; Record at pp. 85-86. Prescott never held title to the Plant, the land, the buildings, the equipment or any of the materials utilized there. *See* Affidavit of von Dohlen, Resp. App. A, at para. 16; Record at p. 89; and Affidavit of Prescott, Resp. App. B at para. 10; Record at p. 94. Nor was Prescott even an employee of the Plant, and he undisputably played *no* role whatsoever in its day-to-day operations. He lived outside of the state, visiting only two to four times a year, and remained involved only to the extent of reviewing financials in order to monitor his investment. Resp. App. B at paras. 2, 4, 6, 8 and 9; Record at pp. 92-93.

After the Plant ceased operation in March of 1985,

only a few officers were retained as employees of IBP. They proceeded to engage in a cleanup of the Plant site to make it presentable for sale. Resp. App. A, para. 15; Record at pp. 88-89. IBP was contacted by Gordon Kolb ("Kolb"), who negotiated to purchase the site in order to develop a shopping center, which would of course require the demolition of the Plant facility then located on the Plant site. IBP agreed in May of 1985 to sell the property to Kolb or his designee for $3,400,000, with IBP having the obligation to tear the building down to the slab. At the request of Kolb, that agreement was later modified. The price was reduced by some $410,000 because Kolb decided to undertake demolition of the Plant building, without any obligation to do so on the part of IBP. Kolb thought he could do the cleanup cheaper than IBP. Of course, Louisiana law (and federal law as well) require that, prior to demolition of any building, all friable asbestos first be removed. *See* La.Ad.Code, Vol. 11, Title 33: III. 2601 at p. 249. Kolb's designee, Riverside Market Development Corporation ("RMDC"), purchased the Plant site on November 7, 1985. Opinion of the District Court, Riverside's App. at p. 19; Record Excerpts at p. 29.

Kolb, President of RMDC, discovered to his chagrin that he had underestimated the cost of demolishing the Plant buildings, which led to this suit against IBP as well as von Dohlen and respondent T. Gene Prescott in an attempt to recover alleged asbestos cleanup costs. Von Dohlen and Prescott were shareholders of IBP. Resp. App. A, para. 2; Record at p. 84; Exhibit B, para. 4; Record at p. 93.

On March 20, 1986, RMDC transferred title to the Plant site to Riverside Market Limited Partnership ("RMLP") and transferred to RMLP its alleged claim for cleanup costs as well. Opinion of the District Court, River-

side's App. at pp. 19-20; Record Excerpts at pp. 29-30. The cleanup was completed in August of 1986 according to the Original Complaint. This suit was filed by RMDC on December 2, 1988, notwithstanding the fact that it had transferred its claim to RMLP. The Complaint was subsequently amended to add RMLP as an additional plaintiff, without dismissing the claims of RMDC. Record, Vol 1 at p. 186. More recently, RMLP transferred its claim to twelve individuals, who were substituted as plaintiffs. Record, Vol. 1 at p. 104; Opinion of the District Court, Riverside's App. at p. 20; Record Excerpts at pp. 29-30.

SUMMARY OF ARGUMENT

Petitioners Riverside Market Development Corporation, et al. (collectively "Riverside") claim that the Fifth Circuit has defined "owner or operator" in CERCLA so as to totally exclude personal liability on the part of corporate officers, directors or shareholders for any CERCLA violations by their corporation. On the contrary, the Fifth Circuit specifically held that individuals cannot hide behind a corporate shield "when as 'operators' they themselves actually participate in the wrongful conduct prohibited by [CERCLA]." *Riverside Market Development Corp. v. International Building Products*, 931 F.2d 327, 330 (5th Cir. 1991).

Because it completely misapprehended the holding of the Fifth Circuit, Riverside claims that there is a split in the circuits. In reality, both cases from other circuits cited by Riverside relied on precisely the same principle of law as the Fifth Circuit. *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.* ("NEPACCO"), 810 F.2d 726 (8th Cir.), *cert. denied* 484 U.S. 848 (1987); and *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

The *NEPACCO* court held that a corporate officer was liable only because he was personally involved in the transportation and disposal of hazardous substances and actually participated in the company's CERCLA violations. 810 F.2d at 744. In *Shore Realty*, the Second Circuit noted that the individual defendant specifically directed, sanctioned and participated in the company's maintenance of the nuisance. 759 F.2d at 1052. Additionally, each of the district court opinions relied on by Riverside are premised on the same rule of law as the decisions by the Fifth, Eighth and Second Circuit Courts of Appeals: An individual who actively participates in the tort of a corporation is personally liable along with the corporation. 931 F.2d at 330; 810 F.2d at 744; 759 F.2d at 1052, respectively.

The holding by the Fifth Circuit in this case does not represent a departure from the norm. Rather, the Fifth Circuit relied upon *NEPACCO* (931 F.2d at 330) and its own earlier decisions which stand for the same rule of law. *See Mozingo v. Correct Mfg. Corp.*, 952 F.2d 168 (5th Cir. 1985); *Shingleton v. Armour Velvet Corp.*, 621 F.2d 180, 183 (5th Cir. 1980).

Applying the well-settled law to the facts of the instant case, all four judges who have reviewed the record thus far have unanimously agreed that Respondent/Defendant T. Gene Prescott ("Prescott") cannot be held liable under CERCLA. The Fifth Circuit noted that Riverside had failed to come forward with any evidence showing that Prescott personally participated in any conduct that violated CERCLA. He lived in New York, visited the plant site in New Orleans rarely, and limited his involvement to reviewing financial statements and attending certain meetings of the officers. *Riverside*, 931 F.2d at 330. Prescott played no role whatsoever in the day-to-day operations of the Plant, which was owned and operated by IBP.

IBP employed 220-240 people at the Plant. There were five levels of management, including various officers dealing with environmental matters, who reported to the vice president of manufacturing, who was in charge of all Plant operations. These same facts would have properly led to the same result in the Second and Eighth Circuits as well.

Riverside has misstated the holding of the Fifth Circuit in this case. The law throughout the United States is uniform, and requires a fact-intensive review of the record. Riverside has no justifiable complaint about the law in this case, it simply does not like the result dictated by the facts. Accordingly, its petition is due to be denied.

ARGUMENT

Petitioners Riverside Market Development Corporation, et al. (collectively, "Riverside") style their petition for writ of certiorari as an opportunity for this Court to resolve a conflict between the circuits involving the definition of "owner or operator" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.* Specifically, Riverside complains that the Fifth Circuit has defined "owner or operator" so as to totally exclude personal liability on the part of corporate officers, directors or shareholders for the CERCLA violations of the corporation. Riverside Brief at pp. 11-12.

Riverside's argument, however, is based on a complete misapprehension of the Fifth Circuit's holding. In short, the Fifth Circuit held that:

> Under traditional concepts of corporate law, the principle of limited liability would protect officers or employees ... from being held responsible for the acts of a valid corporation. However, CERCLA prevents individuals from hiding behind the corporate shield, when as "operators,"

> they themselves actually participate in the wrongful conduct prohibited by [CERCLA].

Riverside Market Development Corp. v. Int'l Bldg. Prod., 931 F.2d 327, 330 (5th Cir. 1991); Riverside App. at pp. 13-14.

Thus, the Fifth Circuit's decision does not, as Riverside contends, confer blanket immunity on corporate officers contrary to the intent of Congress in enacting CERCLA. Moreover, in its holding, the Fifth Circuit reaffirmed its own precedent on this issue, and followed the decisions of other circuits.

Riverside's claim that there is a conflict between the courts of appeals is betrayed by the very cases upon which Riverside stakes its claim, *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.* (*"NEPACCO"*), 810 F.2d 726 (8th Cir.), *cert. denied* 484 U.S. 848 (1987); and *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2nd Cir. 1985).

In *NEPACCO,* the Eighth Circuit held a corporate officer liable under CERCLA. In so doing, however, the court noted that "[l]iability *was not* premised solely upon [the defendant's] status as a corporate officer or employee." 810 F.2d at 744 (emphasis added). Instead, the court imposed individual liability because the defendant "personally arranged for the transportation and disposal of hazardous substances on behalf of NEPACCO and thus actually participated in NEPACCO's CERCLA violations." *Id.* In sum, the liability imposed on the corporate officer in *NEPACCO* "was not derivative but personal." *Id.* The rule in the Eighth Circuit is precisely that of the Fifth Circuit, according to the *NEPACCO* court.

> A corporate officer is individually liable for the torts he [or she] personally commits [on behalf of the corporation] and cannot shield himself [or herself] behind a corporation when he [or she] is

> an actual participant in the tort. The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his [or her] responsibility.

Id., quoting Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978). Indeed, the court below *in this action* relied on *NEPACCO* in articulating the relevant standard. 931 F.2d at 330; Riverside App. at p. 15.

Similarly, in *Shore Realty*, the Second Circuit held an officer and stockholder liable under CERCLA. As in *NEPACCO*, the court did not impose liability solely on the basis of the defendant's status as an officer of the corporation. Instead, the court found that the defendant was "in charge of the operation of the facility in question ..." and "specifically directs, sanctions, and actively participates in Shore's maintenance of the nuisance," and thus held him personally liable under CERCLA. 759 F.2d at 1052. Like the Fifth and Eighth Circuits, the Second Circuit noted that:

> New York courts have held that a corporate officer who controls corporate conduct and thus is an active individual participant in that conduct is liable for the torts of the corporation.

Id.

Riverside also points to several district court decisions supposedly in conflict with the Fifth Circuit's holding in this case. In each of those decisions, the court found individual, not derivative, liability on the part of corporate officers, directors or shareholders arising out of the respective defendant's active participation in or management

authority over the conduct violating CERCLA. *Kelly ex rel. Michigan NRC v. Arco Indus.*, 721 F.Supp. 873, 878 (W.D. Mich. 1989) (individual liability of corporate officers based on "knowledge, responsibility, opportunity, control and involvement in the disposal process"); *United States v. Fleet Factors Corp.* 724 F.Supp. 955, 961 (S.D. Ga. 1988) (individual liability based on fact that defendants "actively managed the facility"); *United States v. Conservation Chemical*, 628 F.Supp. 391, 420 (W.D. Mo. 1985) (individual liability based on a "high degree of personal involvement in the operation and the decision-making process"); *United States v. Carolawn Co.*, 21 E.R.C. 2124, 2131 (D.S.C. 1984) (individual liability of "corporate officials ... who are responsible for the day-to-day operations of a hazardous waste disposal business"); *Kelly v. Thomas Solvent Co.*, 727 F.Supp. 1554, 1562 (W.D. Mich. 1989) (court should look to, among other things, authority to control waste handling practices, responsibility undertaken for same, and liability requires "more than mere status as a corporate officer or director").

Finally, Riverside contends that the Fifth Circuit's decision contradicts its other holdings on this issue. The cases cited by Riverside, however, stand only for the proposition, affirmed by the Fifth Circuit in this case, that a corporate officer who takes part in the commission of a tort of the corporation may be held individually liable along with the corporation. *See Mozingo v. Correct Mfg. Corp.*, 952 F.2d 168, 173 (5th Cir. 1985); *Shingleton v. Armour Velvet Corp.*, 621 F.2d 180, 183 (5th Cir. 1980). Similarly, Riverside's reliance on *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972), is somewhat puzzling. In *Mobil*, the court addressed only the issue of whether a corporation was a "person in charge" within the meaning of the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.*:

> We conclude that an owner-operator [Mobil Oil] is "in charge" of his facility within the meaning of [the WPCA]. It necessarily follows that a corporate owner, a "person" within the statutory definition, is a "person in charge" of the facilities it owns and operates....

464 F.2d at 1127. *Mobil* did not address individual liability of corporate officers, nor does it provide any guidance on this issue. Thus, Riverside's reliance on this case is misplaced.

As the foregoing discussion indicates, the Fifth Circuit's holding is entirely consistent with the holdings of other circuits and the district courts. The Fifth Circuit does not by its ruling immunize corporate officers from liability under CERCLA, but rather correctly applies traditional tenets of corporate law in choosing not to hold officers and directors liable unless the particular defendant has actively participated in the tort of the corporation.

Riverside's claim that Prescott is an owner or operator under CERCLA takes a leap that neither the facts nor the law support. Prescott never held title to the Plant, the land, the buildings, the equipment or any of the materials utilized there. *See* Affidavit of von Dohlen, Resp. App. A, at para. 16; Record at p. 89; and Affidavit of Prescott, Resp. App. B at para. 10; Record at p. 94. It was clearly owned and operated by IBP, which employed the 220 to 240 workers at the Plant and which also employed the five levels of management involved in running the Plant. "Management" was made up of foremen who reported to production superintendents, who, in turn, reported to the Production Manager, who, in turn, reported to the Vice President of Manufacturing, Mr. Ray Plauche ("Plauche"). *See* Resp. App. A, paras. 6 and 8; Record at

pp. 85 and 86.

Von Dohlen held the title of President and functioned as chief executive officer of IBP from its inception in March of 1981 until he was replaced as chief executive officer by Timothy Eames ("Eames") in December of 1982. *See* Affidavit of von Dohlen, Resp. App. A at para. 7; Record at pp. 85-86. No one associated with IBP, including von Dohlen and Prescott, had experience in the manufacture of asbestos products. For that reason, the Plant manager for National Gypsum for a number of years, Plauche, was retained as Vice President of Manufacturing of IBP. He was in charge of the day-to-day running of the Plant, living in New Orleans and working at the Plant daily. Resp. App. A, paras. 5 and 11; Record at pp. 85 and 87. Von Dohlen resided in New Jersey but spent 40 percent of his time in New Orleans. Resp. App. A at paras. 1 and 9; Record at pp. 84 and 86.

Various officers handled environmental matters and reported to Plauche. IBP at all times had officers and staff who were knowledgeable and experienced regarding environmental matters who operated the Plant just as it had been operated for decades by National Gypsum. Resp. App. A, paras. 11, 13 and 15; Record at pp. 87-89.

Prescott was a shareholder and served as Chairman of the Board of Directors. He was never an employee of IBP and Riverside has not and cannot point to *any* evidence that he played any role in the day-to-day running of the Plant. Nor did Prescott ever have any responsibility for or participate in either the cleanup or disposal of any waste, whether hazardous or not. Affidavit of Prescott, Resp. App. B at paras. 4-8; Record at pp. 92-93.

Based on the undisputed facts of this case, the Fifth

Circuit found that Prescott had not actively participated in the management of the Plant or any violations of CERCLA.[1] As the court succinctly noted in its *per curiam* opinion:

> The plaintiffs in this case have failed to come forward with any evidence showing that Prescott personally participated in any conduct that violated CERCLA. The record clearly indicates that Prescott spent very little time at the asbestos plant, and no evidence has been presented to indicate that such visits would have provided Prescott with the opportunity to direct or personally participate in the improper disposal of asbestos or asbestos by-products. Prescott lived in New York and only visited New Orleans two to four times a year, and his participation in plant operations were limited to reviewing financial statements and attending meetings of the officers where he consulted with von Dohlen and others.

Riverside, 931 F.2d at 330; Riverside App. at p. 16. Under either the Eighth Circuit test in *NEPACCO* or the Second Circuit test in *Shore Realty*, these undisputed facts would lead to results identical to those obtained in the Fifth Circuit.

CONCLUSION

The Fifth Circuit has not granted blanket immunity to corporate officers, as Riverside mistakenly contends. Moreover, the alleged conflict between the Circuits does not exist. The Fifth Circuit has followed the long-standing

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[1] At page 9 of its brief, Riverside describes Prescott as an "active manager" of IBP. As the facts show, and as the District Court and Fifth Circuit held, that characterization is wrong.

rule, uniform throughout the Circuits, that individual liability may be imposed on corporate officers, directors or shareholders who actively participate in the tort of the corporation. The issue in this case, and in the other cases like it, is not one of law but of fact. The four judges that have reviewed the record thus far have unanimously agreed that Prescott was not an active participant in the alleged CERCLA violations of IBP, and thus, he was correctly dismissed from this suit. Accordingly, Riverside's petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 1991, a copy of this pleading has been served upon Scott R. Bickford and John R. Martzell of Martzell, Thomas & Bickford, 338 Lafayette Street, New Orleans, Louisiana 70130, telephone (504) 581-9065, attorneys for Petitioners, via U.S. mail, correct postage prepaid. All parties required to be served have been served.

RALPH S. HUBBARD III

18/11/D/05

RESP. APP. A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RIVERSIDE MARKET DEVELOPMENT CORPORATION AND RIVERSIDE MARKET LIMITED PARTNERSHIP	*	CIVIL ACTION
Versus	*	NO. 88-5317
INTERNATIONAL BUILDING PRODUCTS, INC., GERARD N. VON DOHLEN and T. GENE PRESCOTT	*	SECTION L
	*	MAGISTRATE 6

* * * * * * *

AFFIDAVIT

STATE OF New Jersey

COUNTY OF Bergen

BEFORE ME, Notary Public in and for the County and State aforesaid, personally came and appeared.

Gerard N. von Dohlen

who, upon being duly sworn, deposed and said that:

1. He resides in Tenafly, New Jersey and has a business address in Port Newark, New Jersey. He has never been a resident of New Orleans.

2. He was an investor in International Building Products, Inc. ("IBP"), a defendant named in the above captioned case, during the time that IBP owned a manufacturing plant located in the city of New Orleans. He at one time owned 15% of the company stock and currently own none.

3. IBP purchased the manufacturing plant located in the City of New Orleans on Tchoupitoulas Street (the "Plant") from National Gypsum on March 11, 1981 which Plant is the subject of the captioned lawsuit. The Plant ceased operations in approximately March of 1985 and the Plant site was purchased by one of the plaintiffs, Riverside Market Development Corporation, on November 7, 1985.

4. Prior to the purchase by IBP, the Plant had been operated for approximately 53 years, 28 years by National Gypsum Company and 25 years by R.J. Dorn Corporation and Asbestone Corporation. During its entire existence, the Plant was used to manufacture asbestos cement products which were shingles, siding and flat sheets.

5. No one associated with IBP had any experience in dealing with asbestos. Thus, the entire National Gypsum work force located at the Plant was hired by IBP to continue operation of the Plant including Mr. Ray Plauche, who had been in charge of the operations of the Plant for a number of years when it was owned by National Gypsum Company.

6. While the Plant was in operation by IBP, it employed between 220 and 240 people.

7. From March of 1981 until approximately March of 1985 the Plant was owned and operated by IBP. IBP continued to own the Plant after operations ceased until it was sold in November, 1985. Mr. von Dohlen held the title of

Chief Executive Officer for the 20 month period from March of 1981 until December of 1983 at which time Mr. Timothy Eames became the Chief Executive Officer. During his tenure as Chief Executive Officer, he actually functioned as Marketing Vice President. In that capacity, he supervised the marketing of the final product rather than day to day operations in the manufacturing of that product. He has been a member of the Board and President since IBP's inception.

8. The actual operation of machinery at the Plant was supervised by unionized employees called machine tenders. These employees reported to foremen of which there were approximately 12. These foreman, in turn, reported to production superintendents. The Plant had two Production Superintendents, one responsible for mill, or wet machine operations, and one responsible for finishing and shipping. These two individuals, as well as the Plant Engineer, reported to the Production Manager who in turn reported to the Vice President of Manufacturing, Mr. Plauche. Also reporting to the Vice President of Manufacturing were (1) the Personnel and Safety Director; (2) the Quality Control Supervisor; and (3) the Production Engineer. The Vice President of Manufacturing in turn reported to the Chief Executive Officer. Consequently, five (5) levels of management separated the Chief Executive Officer from the actual operation of the equipment at the Plant.

9. From 1981 through December of 1983 he spent less than 40% of his time in the City of New Orleans.

10. Since December of 1983, Mr. von Dohlen has had virtually nothing to do with IBP. He has been in the City of New Orleans only twice since December of 1983. On one occasion he came to attend the sale of the Plant site to

Riverside Market Development Corporation in November of 1985. On another occasion he was in New Orleans to meet with Mr. Gordon Kolb, a representative of the purchaser, in May of 1985.

11. The officers of IBP who were responsible for environmental matters and dealt with the environmental agencies such as the United States Environmental Protection Agency ("EPA") and the Louisiana Department of Environmental Quality ("DEQ") reported directly to Mr. Plauche, Vice President of Manufacturing. Mr. Plauche and those persons reporting to him dealt directly with all of the regulatory agencies on behalf of IBP as they had during National Gypsum's tenure. Mr. Plauche was in charge of running the Plant on a day to day basis, and lived in New Orleans and worked daily at the Plant site.

12. During his tenure with IBP, Mr. von Dohlen was unaware of any environmental violations. Throughout his tenure, the Plant was an operating entity subject to OSHA regulations. Operations did not cease until some 16 months after he was replaced as Chief Executive Officer by Mr. Eames.

13. At all times during the operations of the Plant, IBP had sufficient officers and staff who were experienced and knowledgeable regarding environmental matters and who continued to operate the Plant as it had been operated for decades under National Gypsum Company.

14. Since its incorporation, IBP has been a separate legal entity responsible for its own obligations. At no time has it been used as the alter ego of its shareholders, officers or directors. This is demonstrated by the following facts:

(a) Throughout the time the Plant was owned by IBP, IBP was audited by the "Big Eight" accounting firm of Touche Ross;

(b) Corporate and officer, director and shareholder funds have never been co-mingled;

(c) IBP always maintained separate bank accounts from those of its shareholders, officers and directors;

(d) IBP always maintained separate bookkeeping records from those of any of its shareholders, officers or directors;

(e) Shareholders and directors meetings were held on regular basis;

(f) IBP was adequately capitalized and only closed its Plant in New Orleans due to a nationwide trend of reduction in purchase of materials containing asbestos;

(g) IBP retained and paid its own employees and maintained its own insurance and workmen's compensation program;

(h) IBP always filed its own tax returns.

15. He did not participate in any way in the cleanup of the Plant or disposal of any waste products from the Plant, whether hazardous or not during the operation of the Plant or after operations ceased. He was not present in New Orleans during the cleanup after operations ceased and was not the Chief Executive Officer at that time. Corporate officers, under the direction of Ray Plauche, Ken

Lacy and Timothy Eames, supervised IBP employees handling such functions.

16. At no time did he or any other officer, director or shareholder personally own the Plant, the land where it was located, or any materials or equipment located at the Plant.

17. At no time has he owned or operated any facility at which hazardous substances were disposed.

18. At no time has he by contract, agreement or otherwise arranged for disposal or treatment or arranged with a transporter for the transport for disposal or treatment of hazardous substances of any kind or nature.

19. At no time has he accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or any other site.

20. At no time has he owned or operated any building, structure, installation, equipment, pipe or pipeline, well pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel or aircraft or any site or area where a hazardous substance has been deposited, stored, disposed of or placed or otherwise come to be located.

21. He has never generated or been involved in the generation of a hazardous substance which was subsequently disposed of or discharged.

22. He has never transported a hazardous substance which was disposed of or discharged.

23. He has never disposed of or discharged a hazardous substance.

24. He has never contracted with a person for transportation or disposal of any hazardous substance.

25. He has never received a demand from any state or federal agency, including, without limitation, the Secretary of the Department of Environmental Quality for the State of Louisiana, relating to the discharge of hazardous waste in any fashion, including without limitation any demand notifying him that he is or may be liable for disposal of hazardous waste or requiring that he undertake remedial actions at any site in accordance with a plan approved by a state or federal official or agency or pay the cost of any remedial action which may be taken by said federal or state official or agency. He has never been sued by the Louisiana Department of Environmental Quality. He has never received a demand such as that contemplated by LA R.S.30:2275.

26. He is familiar with the records of IBP and, to the best of his knowledge, information and belief, IBP never received a demand from the Secretary of the Louisiana Department of Environmental Quality (nor has it been sued by said Secretary) seeking to have IBP undertake remedial action in compliance with the demand and is approved by said Secretary in order to accomplish the cleanups allegedly engaged in by the plaintiff in 1986 at the Plant. IBP has never received a demand such as that contemplated by LA R.S.30:2275.

/s/ Gerard N. von Dohlen

Gerard N. von Dohlen

SWORN TO AND SUBSCRIBED
before me this 5 day
of March, 1990.

/s/ Florence Ragazzo

Notary Public

RESP. APP. B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RIVERSIDE MARKET DEVELOPMENT CORPORATION AND RIVERSIDE MARKET LIMITED PARTNERSHIP	*	CIVIL ACTION
versus	*	NO. 88-5317
INTERNATIONAL BUILDING PRODUCTS, INC., GERARD N. von DOHLEN and T. GENE PRESCOTT	*	SECTION M
	*	MAGISTRATE 2

* * * * *

AFFIDAVIT

STATE OF New Jersey

COUNTY OF Bergen

BEFORE ME, Notary Public in and for the County and State aforesaid, personally came and appeared

T. GENE PRESCOTT

who, upon being duly sworn, deposed and said that:

1. He resides in New York City and has a business address in Port Newark, New Jersey.

2. He has never lived or worked in the State of Louisiana.

3. He is an investor in International Building Products, Inc. ("IBP"), a defendant named in the above-captioned case.

4. At no time did he participate in the operation of the manufacturing plant located in the City of New Orleans on Tchoupitoulas Street which is the subject of the captioned lawsuit (the "Plant"). The Plant was owned by IBP from March 11, 1981 through November 7, 1984. His role in connection with IBP has at all times been that of a passive investor. There are presently four shareholders of IBP and he owns 65 percent of the stock outstanding.

5. He was never an officer of IBP, merely holding the title of Chairman of the Board since IBP's incorporation.

6. He has never had any day-to-day responsibilities regarding IBP. He functioned more like someone who owns stock in a New York Stock Exchange company, reading the financial statements of IBP and attending board meetings in Port Newark, New Jersey.

7. He had no responsibility for and did not participate in any contracts, negotiations or contracts with firms which supplied asbestos to the Plant in New Orleans. Corporate officers and IBP employees handled such functions.

8. He had no responsibility for and did not participate in any way in the operation of the Plant itself or the cleanup or disposal of any waste products from the Plant, whether hazardous or not. Corporate officers and IBP employees handled such functions.

9. He visited the Plant at most one to three times a year from 1981-1984. Those visits did not relate to operation of the Plant, but rather were to attend the annual Christmas party; to attend, together with numerous IBP personnel and officers, a meeting of an erectors' association, some of whose members used products from the Plant and to visit briefly with executive personnel.

10. At no time did he personally own the Plant or the land where it was located.

11. At no time has he owned or operated any facility at which hazardous substances were disposed.

12. At no time has he by contract, agreement or otherwise arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment of hazardous substances of any nature or kind.

13. At no time has he accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or any other site.

14. At no time has he owned or operated any building, structure, installation, equipment, pipe or pipeline, well pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel or aircraft or any site or area where a hazardous substance has been deposited, stored, disposed of or placed or otherwise come to be located.

15. He has never generated or been involved in the generation of a hazardous substance which was subsequently disposed of or discharged.

16. He has never transported a hazardous substance

which was disposed of or discharged.

17. He has never disposed of or discharged a hazardous substance.

18. He has never contracted with a person for transportation or disposal of any hazardous substances.

19. He has never received a demand from any state or federal official or agency, including, without limitation, the Secretary of the Department of Environmental Quality for the State of Louisiana, relating to the discharge of hazardous waste in any fashion, including without limitation any demand notifying him that he is or may be liable for disposal of hazardous waste or requiring that he undertake remedial actions at any site in accordance with a plan approved by a state or federal official or agency or pay the cost of any remedial action which may be taken by said federal or state official or agency. He has never been sued by the Louisiana Department of Environmental Quality. He has never received a demand such as that contemplated by LA R.S.30:2275.

/s/ T. Gene Prescott

T. Gene Prescott

SWORN TO AND SUBSCRIBED
before me this 5 day
of March, 1990.

/s/ Florence Ragazzo

Notary Public